STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY A. OLIVER REVOCABLE TRUST, by and through DOROTHY A. OLIVER, Trustee,

Plaintiff-Appellant,

v

DENTON TOWNSHIP, ROSCOMMON COUNTY ROAD COMMISSION, ROSCOMMON COUNTY, DEPARTMENT OF TREASURY, and DEPARTMENT OF TRANSPORTATION,

and

Defendants-Appellees,

and

EARL WEBB, JOYCE WEBB, EARL C. WEBB, JR., LAURA DUNSTAN, EDWARD POSTOR, CHRISTOPHER LOESSER, JILLAINE LOESSER, RICHARD GLESER, DNJ ASSOCIATES, GERALD F. JANUZZI, DIANE L. BOEHMER, TRAVERSE BAY WOOLEN COMPANY, ROBERT SHEA, LAURA J. SHEA, DOLORES W. JOHNSON, JOSEPH L. SMITH, EAST BAY DEVELOPMENT, KONNIE MCWILLIAMS, JAMES L. MCWILLIAMS, DOROTHY M. HOOPER, DUANE L. HOOPER, DAVID F. GRESHOW, IRENE BREYER SMITH, GALE C. MILLER, JUDITH R. PAXSON, ALFRED R. PAXSON, WILLIAM L. HAMMOND, WILLIAM F. MURRAY, FREDERICK K. ULRICH, JON R. NUGENT, PATRICIA ULRICH, WALTER L. LAMASTERS, D. J. FOWLER, TERESA A. SPEARS, GERALD C. TOMASEK, HELEN M. TOMASEK, DENISE GLESSER, ROSCOMMON COUNTY DRAIN COMMISSION,

UNPUBLISHED
August 13, 2002

No. 230765
Roscommon Circuit Court
LC No. 95-006890

Defendants,

and

D. J. FOWLER,

Third-Party Plaintiff,

v

DENTON TOWNSHIP, ROSCOMMON COUNTY ROAD COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF TRANSPORTATION, JUDITH R. PAXSON, ALFRED R. PAXSON, JON R. NUGENT, WALTER L. LAMASTERS, TERESA A. SPEARS, ROSCOMMON COUNTY DRAIN COMMISSION, MICHELE RESSA, DON RESSA, KRONNER PHARMACY, GWENDOLYN SCHMALTZ, ROBERTA BARAN, KING VENTURES, INC., WALTER MAIKE, SHERRIE DEMARCO, LAWRANCE DEMARCO, ELDA E. STRATY, JULIA E. DOULES, LAKESIDE DEVELOPMENT, NBD BANK, NA, GEORGE PAPPAS, ROBERT L. BRITTON, STANDARD FEDERAL BANK, DAWN CARTER, ROY RATHKA, DONALD SCHMALTZ, JULIE ROULO, NEAL CARTER, and BETTY RATHKA,

Third-Party Defendants.

Before: Murray, P.J., and Murphy and Kelly, JJ

PER CURIAM.

Plaintiff appeals as of right, following a bench trial, from a judgment denying plaintiff's request that portions of Outlot A, adjacent to parcels owned by plaintiff and located in the plat of Idlewild Resort on the south shore of Houghton Lake, be vacated with title being quieted in plaintiff's favor. Plaintiff also appeals the denial of its alternative request that the trial court

recognize plaintiff's riparian rights in the subaqueous lands of Houghton Lake adjacent to the relevant portions of Outlot A.[1] We affirm in part and reverse in part.

I. BASIC FACTS

We initially note that our review of the chain of title and history regarding Outlot A is somewhat limited because, although the parties cite to numerous facts and documents concerning the lot's history, the parties, inexplicably, did not place many of those facts and documents into evidence at trial. We additionally note that the trial court's ruling regarding Outlot A related to plaintiff's lots 187, 206, 228, and 252; however, plaintiff's appellate argument, as to both issues presented, only concerns lots 187 and 206, and our review will be so limited.

Plaintiff owns various lots in the Idlewild Resort Subdivision, which was platted in 1920. Outlot A, an arcing strip of land within the subdivision, lies directly between the lots at issue and the shore of Houghton Lake. Therefore, in order for plaintiff to directly access the lake from the lots, it is necessary to first pass over Outlot A.

The 1920 plat does not make any reference to a dedication by the developers of Outlot A, and the parties are in agreement that no dedication was made at that time with ownership of Outlot A being retained by the developers. From 1920 through 1936, Outlot A was allegedly transferred and mortgaged by several persons and entities; however, no evidence concerning these transactions was presented at trial, and we find it unnecessary to consider these transactions for purposes of our analysis. The record does include a 1936 quitclaim deed concerning, in part, Outlot A, which was prepared and executed pursuant to a circuit court order, and which indicated that the State Bank of Beaverton, by Ira Early, receiver, transferred any interests in the lot to the public for public purposes only. The quitclaim deed also indicated that all of the property transferred was only to be used for roads and a playground. The parties agree that the 1936 quitclaim deed concerned the relevant portions of Outlot A; however, plaintiff asserts that the deed was a dedication subject to acceptance, and defendants assert that it was not a dedication but simply a conveyance of a fee not subject to acceptance.

Although there is no direct evidence reflected in the trial record, apparently lots 187 and 206 were purchased by William Oliver, the husband of Dorothy Oliver, from the estate of Marian E. Vanderberg in 1978. The Olivers' son, William Oliver, II [hereinafter "Oliver"], testified that he lived in Houghton Lake since moving there with his family in 1967.[2] Oliver

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[1] Plaintiff also sought to vacate and obtain quiet title in various roads in the plat, and there was a third-party complaint which concerned an attempt to vacate other portions of Outlot A; however, those matters are not before us. We also note that ownership of the relevant parcels of property is held by the Dorothy Oliver Revocable Trust, and that the trustee, Dorothy Oliver, based on the testimony of her son, died in 1992, which is three years before the instant litigation was filed. We cannot ascertain why or how the lawsuit was brought through Dorothy Oliver, but defendants apparently did not address the matter, and neither will this Court.

[2] The record is not clear whether Oliver's reference to "family" included his father and his mother, although that would appear to be the case. Additionally, we infer from the evidence that the Oliver family owned other lots in the subdivision commencing in 1967 but not lots 187 and 206.

further testified that located on Outlot A adjacent to lots 187 and 206 were a log cabin, a boathouse, a framed cottage, and a shed. Oliver asserted that those structures had been there since he moved to Houghton Lake in 1967, and that the structures appeared old in 1967, requiring repairs and maintenance. Oliver also testified that the relevant portions of Outlot A had suffered serious erosion that destroyed a seawall, that several trees were tipping towards the water because of the erosion, that he personally had several trees removed that had fallen in the water, that the county refused to remove any of the trees as requested, that he had never seen anyone maintain the area other than his family, and that he had never seen the general public use the area in the thirty-three years he lived in Houghton Lake.

Carl Gieger, a county commissioner, testified that when he was a youth, roughly from the late 1940s through the 1950s, he and other youths would use all of Outlot A for swimming and boating, and that no one forced them off the area. Gieger acknowledged on cross-examination that he could not specifically identify that portion of Outlot A adjacent to lots 187 and 206 as a place where he played as a youth, and that the area was much less populated at the time.

Gieger also testified that Outlot A was used extensively over which to transport equipment during a sewer project undertaken in Denton Township in the early 1970s, although, he had no knowledge of sewer lines actually being located on Outlot A. Geiger could not specifically state that equipment was ever placed on, or transported over, Outlot A adjacent to lots 187 and 206, and he admitted that said area was almost all trees.

Bill Faino, Denton Township supervisor, testified that most of the owners of lots along Outlot A had their own boat hoists, seawalls, docks, and boats, and that the township had not taken any action to stop such use. Faino's reference to a swimming beach maintained by the township is located in Outlot B.

In 1973, Marian VanderBerg, the owner of lots 187 and 206 at the time, commenced a lawsuit regarding those portions of Outlot A adjacent to the lots, naming the county and the township, among others, as the defendants. *VanderBerg v Johnson,* Roscommon Circuit Court, Docket No. 73-1225-CX. In 1975, a consent judgment was entered pursuant to which the relevant portions of Outlot A were to be held by VanderBerg and her assigns as essentially a leasehold estate for thirty-five years with legal title and the remainderman's interest after the estate expired being confirmed in the county and held in trust for the general public.

Pursuant to a warranty deed dated March 3, 1989, William and Dorothy Oliver transferred the lots at issue to the Dorothy Oliver Revocable Trust.

II. TRIAL COURT'S RULING

The trial court found that Outlot A had not been dedicated when the subdivision was platted in 1920, and that the fee ownership, therefore, was retained by the developers. The court further found that the 1936 quitclaim deed arising out of the receivership was not a dedication subject to acceptance, but rather a conveyance granting ownership of Outlot A to Roscommon County with the property being held in trust by the county for public purposes. The trial court ruled that the 1975 consent judgment entered in *VanderBerg v Johnson* confirmed the county's ownership, and although not res judicata for purposes of the present action, the county's participation in the case negated any possible claim that Outlot A had not been accepted by the

county. The court concluded that Roscommon County owned the relevant portions of Outlot A, and because the county was against vacating Outlot A, plaintiff's request for relief was denied.

Regarding riparian rights in the subaqueous lands of Houghton Lake adjacent to the relevant portions of Outlot A, the trial court ruled that the county owned Outlot A adjacent to lots 187 and 206 in fee simple; therefore, the county held any riparian rights. The court stated that if Outlot A was not a lot but a street or a boulevard, plaintiff's lots would be riparian under the law.

III. ANALYSIS AND CONCLUSION

Standard of Review

Equitable decisions are reviewed de novo. *Mitchell v Dahlberg*, 215 Mich App 718, 727; 440 NW2d 84 (1996). This Court reviews a trial court's findings of fact in a bench trial for clear error, and the court's conclusions of law are reviewed de novo. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A finding is clearly erroneous where although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). An appellate court will give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989).

Legal Rights in Relevant Portions of Outlot A

We find it unnecessary to address the arguments concerning the law of dedication and acceptance because the doctrine of res judicata barred plaintiff's request that the portion of Outlot A adjacent to lots 187 and 206 be vacated.

The applicability of res judicata is a question of law that is reviewed de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). "Res judicata bars relitigation of claims that are based on the same transaction or events as a prior suit." *Id.* at 577. Res judicata is applicable when (1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. *Id.* at 576. Res judicata applies to consent judgments entered after a settlement. *Id.*[3]

Here, the 1975 consent judgment established legal title to the relevant portion of Outlot A in the county, while providing VanderBerg and her assigns with a leasehold estate for thirty-five years. *VanderBerg v Johnson*, Roscommon Circuit Court, Docket No. 73-1225-CX. Plaintiff is clearly a privy of VanderBerg after VanderBerg's estate conveyed lots 187 and 206 to William and Dorothy Oliver with the lots being subsequently transferred to the revocable trust. The 1973

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[3] In *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991), this Court stated that "[r]es judicata applies to default judgments and consent judgments as well as to judgments derived from contested trials." Citing *In re Cook Estate*, 155 Mich App 604, 609; 400 NW2d 695 (1986).

litigation involved the property interests in Outlot A adjacent to lots 187 and 206, and plaintiff could not relitigate the matter under the doctrine of res judicata. We affirm the trial court's judgment regarding the request to vacate the relevant portion of Outlot A, albeit for different reasons. *Gray v Pann*, 203 Mich App 461, 464; 513 NW2d 154 (1994).

Riparian Rights in the Subaqueous Lands of Houghton Lake

In the alternative, plaintiff requested that the trial court recognize plaintiff's riparian rights in the subaqueous lands of Houghton Lake adjacent to the relevant portions of Outlot A. As noted above, the trial court ruled that the riparian rights belonged to the county as the fee simple owner of Outlot A. We disagree.

In *McCardel v Smolen*, 71 Mich App 560, 562; 250 NW2d 496 (1976), aff'd in part and vacated in part, 404 Mich 89; 273 NW2d 3 (1978), this Court, addressing a dispute between the owners of front lots and back lots in a subdivision located on Higgins Lake, was presented with the following facts:

> Lots in the subdivision are separated from the waters of Higgins Lake by a strip of land designated on the plat as Michigan Central Park Boulevard. The boulevard was dedicated to the county, ostensibly as a public street. But the "boulevard" is actually nothing more than undeveloped beach property. We are asked to decide who owns the riparian rights in the boulevard frontage and to define those rights.

Roscommon County had a fee simple interest in the strip of land, and this Court held that the plaintiffs, owners of the lots directly abutting the "boulevard," held the riparian rights. *Id.* at 564. The determination that the plaintiffs held the riparian rights was not reviewed by our Supreme Court on leave granted. 404 Mich at 94-95.

Here, Outlot A, deeded to the public for public use, was to be used for roads or a playground based on the language of the 1936 quitclaim deed, but like the facts in *McCardel*, the property is essentially undeveloped beach property.[4] Accordingly, plaintiff holds the riparian rights to the lake frontage. However, it was made abundantly clear in the Supreme Court's review on leave granted of this Court's decision in *McCardel*, that the right of the public to

[4] In *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm'n*, 236 Mich App 546, 554; 600 NW2d 698 (1999), this Court stated that a valid common-law dedication of land for public purposes requires (1) an intent by the owners of the property to offer land for public use, (2) an acceptance of the offer by public officials and maintenance of the road by public officials, and (3) general use by the public. We find that the 1936 quitclaim receivership deed was a common-law dedication. Although the 1936 deed was not the typical mechanism of dedicating property contained within a plat, nor done at the time the subdivision was platted, the deed constituted a dedication indicating an intent to offer private land for public use. To find that the deed was not subject to the law of dedication and acceptance would contravene the fundamental principle that private property cannot be forced on a public authority without its consent. *Kraus v Dep't of Commerce*, 451 Mich 420, 429; 547 NW2d 870 (1996).

access a lake from a public way is to be determined by the scope of the dedication. 404 Mich 97-101. The Supreme Court held that the ownership of riparian rights in lakefront property did not necessarily preclude access by the public to the lake by means of the property at the water's edge, which property was dedicated to public use, and that the scope of the dedication controlled the rights of the public to enter and leave the water. 404 Mich at 101-103.

Because there is presently no issue before us regarding the scope of the dedication as made through the 1936 quitclaim deed, and because there is no dispute as to the actual use of plaintiff's riparian rights, it is unnecessary to determine the rights of the public in the use of the lakefront in Outlot A adjacent to lots 187 and 206, and we simply hold that plaintiff does hold riparian rights as owner of those lots.

Affirmed in part and reversed in part.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Kirsten Frank Kelly